



**Okoth v Meditest Diagnostic Services Limited (Cause E410 of 2022)
[2023] KEELRC 3127 (KLR) (17 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3127 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E410 OF 2022
NJ ABUODHA, J
NOVEMBER 17, 2023**

BETWEEN

ANNE WACERA OKOTH CLAIMANT

AND

MEDITEST DIAGNOSTIC SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her statement of claim on 8th June, 2022 pleaded inter alia as follows: -
 - a. The Claimant was employed by the Respondent as an Executive Assistant to the Chief Executive Officer on or about 18th August, 2021 at a monthly salary of Kshs 135,120.50/=
 - b. The Claimant averred that she served the Respondent with due diligence and faithfulness until 21st March,2022 when she was summoned by the Respondent and unfairly terminated though a letter dated 21st March,2022.
 - c. The Claimant averred that the Respondent did not provide pay slips and did not pay statutory deductions to NHIF or NSSF.
 - d. The Claimant further averred that she was not issued with an employment Contract until 21st March,2022 when the Claimant demanded that she be issued with an Employment Contract before she left after termination.
 - e. The Claimant averred that prior to the said unfair and unlawful termination, the Claimant was not given an opportunity for fair hearing contrary to the Principles of natural justice nor was she issued with a statutory notice of termination of her services prior to her dismissal.
 - f. That her termination was wrongful and unfair because she was not given a notice and reason for termination and the Respondent never heard from her or accord her opportunity to make



representations against any accusations prior to termination. That the termination was in breach of section 41 and 45 of the Employment Act.

2. The Claimant in the upshot prayed for the following against the Respondent;
 - a. A declaration that the Termination of the Claimant was illegal and unlawful
 - b. Three months' salary in lieu of Notice Kshs 405,361.50/=
 - c. One Months' Unpaid salary Kshs 135,120.50/=
 - d. 12 Months Compensation for unfair Termination Kshs 1,621,446/=
 - e. Unpaid Leave days Kshs 72,000/=
 - f. Certificate of service
 - g. Costs of the suit and interests on present court rates.
3. The Respondent filed its defence dated 15th March, 2023 and they averred inter alia;
 - i. The Respondent denied the contents of the claim and averred that at various times it warned the Claimant that her actions were against the Company policies. That specifically the Claimant shared signed company minutes and resolution without authority. The Claimant signed minutes and resolution authorizing a third party to be a director of the company thereby putting the company at risk of loss.
 - ii. The Respondent averred that the Claimant was given an opportunity to explain her actions including recording a statement at the Directorate of Criminal Investigations on the signing of the company Resolutions and illegal appointment of a company director without authority. That despite the opportunity the Claimant failed to explain her actions.
 - iii. The Respondent therefore lost the trust required in an employer-employee relationship especially one serving as personal assistant of a senior manager.
 - iv. The Respondent further averred that the reasons and procedure for termination of the Claimant were fair.
 - v. The Respondent further averred that no dues are owed to the Claimant and she can request and collect certificate of service from the Respondent's premises upon normal clearance process.
 - vi. The Respondent prayed that the statement of claim be dismissed.

Evidence

4. Both the Claimant's and Respondent's case were heard on 20th June, 2023 where Claimant had one witness, herself and the Respondent had one witness.
5. CW 1 the Claimant testified and adopted the documents filed before the court as evidence in chief. She further stated that her employment was verbal and she was promised a written contract later. She kept asking for the contract but was never given. Mr Sunil (her boss) told her he was still working on it.
6. CW1 testified that on 21st March ,2022 she reported to work as usual and Mr. Sunil called her to his office and informed her that he could not work with her anymore. She was asked to resign and handover. She went back to her office and Mr. Sunil followed her and gave her a termination letter. CW1 reminded him that she did not have a contract. It was at this point that Mr. Sunil went to his



- office and came back with a backdated contract and asked her to sign the same. It was her evidence that she signed the contract because she was told that if she did not sign, her dues would not be paid.
7. CW1 stated that she did not collect her dues because she did not agree with the reasons for termination. The Claimant used to get instructions from Mr.Sunil to sign documents on his behalf. It was her testimony that Mr. Marrossi was introduced to her by Mr.Sunil as his colleague and she signed the documents on behalf of Mr Sunil because he wanted Mr.Marrossi to do something urgent for him.
 8. It was the CW1 testimony that she never received any warning letters during her employment and that she did not have any of the Respondent's property. She returned her work laptop when she was terminated.
 9. On Cross examination CW1 clarified that she was employed as Executive Assistant to the Director and she was not a director. She confirmed that she signed the Board Resolutions on 23rd December,2022 and she could not confirm if the people mentioned as present in the meeting were there. She confirmed that she was not an employee on 1st June,2021 and she signed a letter admitting a new director dated 21st March 2021 which was signed by herself on 23/12/2021.She testified that she followed the instructions from her director Mr. Sunil by signing on his behalf. She however could not confirm if she had power of Attorney to sign Board Resolutions.
 10. CW1 confirmed that she saw and received the letter computing her dues but rejected the same.
 11. On re-exam CW1 confirmed that she was an employee when she signed on instructions of Mr.Sunil. He called her and instructed her to sign on his behalf. CW1 did not agree with computation of her dues hence why she did not pick them.
 12. The Respondent on the other hand called its witness one Silas Nthiga Njeru its HRM who testified and adopted the documents filed in court as his evidence in chief.
 13. In cross examination he stated that he was an employee when the Claimant was working but was based in Kisii. RW1 could not confirm the relationship between the Claimant and Mr.Sunil. He further stated that some issues were reported to DCI and no one was prosecuted. RW1 filed Board Resolutions and letters signed by the Claimant and Mr. Sunil denied the documents stating they were forged because he never gave such instructions.
 14. RW 1 confirmed that the documents were signed on behalf of Mr.Sunil. The Claimant was never given written contract until time of termination and Claimant received verbal warnings. The Document in question was signed in 23/12/2021 and that Mr.Sunil was not aware of the document. RW1 confirmed that he has not officially met Mr. Marrossi and he was not aware of his personal relationship with Mr.Sunil.
 15. On Re-examination RW1 confirmed that letter from DCI was dated 21st April,2022. The letter was about investigations on conspiracy to defraud. Concerning the meeting of Board of Directors of 1.6.2022, he stated that the Claimant was not an employee when the meeting was convened and Mr. Marrossi was not a director and further that there was no close relationship between the Claimant and the Respondent.

Claimants' Submissions

16. The Claimant filed written submissions dated 20th July, 2023. On the issue of whether the Respondent had fair reason and fairness of procedure she relied on the case of [*Kenya Union of Commercial Food and Allied Workers Union v Jamii Distributors E.A Limited*](#) (2022) KEELRC (KLR).



17. It was the Claimant's submission that section 7,8,9 and 10 of the *Employment Act* requires the employer to issue an employee with an employment contract within two months of employment yet in this case she was issued with employment contract on the day of her termination. In this respect she relied on the case of *Bramwel Dibondo Musundi v Kenya Revenue Authority* (2018) eKLR.
18. On the standard of proof for contractual obligation. She submitted that the Contract which was backdated to 18.8.2021 could not bind the Claimant on what her responsibilities included as an employee particularly with regard to having been given the responsibility of signing documents on behalf of Mr. Sunil, the director/owner of Respondent, whenever directed to do so.
19. It was the Claimant's submission that without such a contract stipulating her responsibilities, the burden shifted to the directors to prove that fact. The director however never appeared in court to give evidence. The documents signed on 23.12.2021 were therefore signed by the Claimant on behalf of the director in course of her business as the Personal Executive Assistant hence the Respondent was estopped from alleging forgery or fraud.
20. It was the Claimant's submission that the letter from DCI of 21.4.2021 made several allegations without referring to the Claimant and the Respondent did not produce a letter requesting for the said investigation. No police officer was called to confirm the said investigations to link the Claimant with the conspiracy to defraud. The Claimant was aware of the provisions of Section 44(4) (e) and (g) of the *Employment Act* on grounds of terminating her employment. The Claimant did not forge or hide her signature she only signed on behalf of the director on a day to day signature well known by the Director hence her termination failed the substantive test and relied on the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
21. It was the Claimant's submission that the Respondent relied on clause 21.1.9 of a contract given on the same day of her termination hence not applicable. No disciplinary procedure was followed and relied on the case of *Moses Keya v Thika High School thro Board of Governors* (2016) eKLR and *Japheth Mudogo v Master Fabricators Limited* (2012) eKLR on the right to be heard before termination.
22. On the orders sought the Claimant submitted that her reputation was ruined leading to filing of a defamation cause MCCC.E6378 of 2023 and that she should be awarded 12 months compensation and all other prayers sought.
23. On the other hand, the Respondent filed its submissions dated 24th July 2023. On the issue of whether the Claimant's summary dismissal was justified in accordance to section 44 of the Act the Respondent submitted that the Claimant was dismissed on grounds of gross misconduct. She signed board resolutions on behalf of the Company appointing a third party to be a director of the Company.
24. The Claimant's conduct was beyond and/ or outside the expected conduct of an Executive Assistant. The respondent relied on the case of *Laws v- London Chronicle Limited* [1959] 2ALL L.R 285 on gross misconduct on the part of the Claimant. The dismissal was therefore substantively fair. The respondent further relied on the cases of *British Leyland UK Limited v-Swift* [1981] 1RLR 91 at 93 per Denning MR and *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015]eKLR.
25. The Respondent submitted that it met the standard of proof in establishing that the Claimant's action amounted to gross misconduct which justified her summary dismissal from employment. The Respondent also submitted that the Claimant was offered a 3 month's pay in lieu of notice which she rejected.
26. On the issue of whether the Claimant's summary dismissal followed due process in accordance with section 45 of the Act, the Respondent submitted that the procedure used to terminate the Claimants



employment was in coherence with Article 41, 47 of the Constitution as well as sections 41 and 45 of the Employment Act. The Respondent relied on the case of Winnie Mbeti Mutua v Brackenhurst Kenya Limited [2021] eKLR, on principles of procedural fairness.

27. The Respondent submitted that it acted in the fairness when it recommended that the Claimant be dismissed because she acted beyond her authority. Her actions were likely to lead to the loss of more than 12 million annually and her fraudulent appointment of a third party as a director was an act of negligence.

Determination

28. I have reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. I have also considered authorities relied on by Counsels.
29. I have I have come up with two main issues;
- a. Whether the Claimant's termination was for a fair reason and procedural hence unfair termination
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination was for a fair reason and procedural hence unfair termination

30. The court has stated previously that it was not within its jurisdiction to over critic the reason for which employment has been terminated. The test usually is the reasonable test. That is to say, would a reasonable employer put in the circumstances dismiss? If the answer be in the affirmative, the court will not interfere.
31. In this case, the Respondent alleged that they summarily dismissed the Claimant on grounds of signing Company board minutes and resolutions without authority and appointing a third party as a director.
32. Whereas the Claimant's case is that she was dismissed on an invalid reason as she signed the minutes and resolutions on behalf of the director who had given her instructions to sign on his behalf. She testified that the said director denied giving such authority but the director was never called as a witness in this case to rebut her position. I have perused the said minutes and letters appointing a third party and I note they were all signed for the Director. The Claimant did not sign as the director. This means without any evidence by the director himself that he never gave instructions the Claimant's evidence in uncontroverted.
33. It is also not in dispute that the Claimant was issued with contract of employment on the date she was terminated on 21st March, 2022. This was unfair labour practice. The Respondent had a legal duty to issue the contract within reasonable time under the Employment Act. The Claimant was therefore not bound by terms of a contract she was never given. During hearing she stated that she acted out of day to day practice hence the Respondent is estopped from stating that she did not have authority.
34. The termination Letter also refers to clause 21.1.9 of a contract the claimant never received. There was no way the Claimant was to be bound by a contract she has never seen and received.
35. Section 43 of the Employment Act places the burden of proving reasons for termination on the employer and the reason ought to be valid and fair and if the employer fails to do so the termination



shall be deemed unfair under section 45 of the Act. In the case of Prof. Macha *Isunde v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal stated:

“ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

36. From the above provisions and case law, it is clear that even in summary dismissal on grounds of gross misconduct, the employer must prove the reasons for termination, the reasons must be justified and the employee must be heard. This did not happen in this case as the respondent decided to dismiss the claimant unheard. In this respect I find that the dismissal of Claimant’s employment was substantially unjustified for there being no valid and fair reason for dismissal.
37. Regarding procedural fairness, it was held in the case of *Walter Ogal Anuro - v- Teachers Service Commission* (2013) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness. Further I am guided by the *Employment Act* on the said procedure under Section 41 of the Act which provides that an employee needs to be explained to, the reasons for termination in language they understand and that an the employer is bound to consider the representations made by such employee or a representative of their choice.
38. The Respondent has maintained that when the Claimant recorded a statement at the Police she was given opportunity to explain herself which she failed. The Respondent also confirmed that the Claimant was given verbal warnings. The Claimant on the other hand maintained that she has never been given any warning.
39. The Claimant was never given any show cause letter or opportunity to respond and make representations on the charges levelled against her. The Respondent’s witness confirmed no charges had been preferred against her and the letter from DCI attached did not refer to the Claimant in any way. There was no letter from the Respondent to the police requesting the police to undertake investigations on the Claimant. There was also no disciplinary hearing given to the Claimant to defend herself on such allegations.
40. On the burden of proving and justifying the grounds of dismissal/termination of employment as observed earlier are cast upon the employer by virtue of section 47(5) of the *Employment Act*. The respondent has not discharged this legal burden. The Court therefore finds and holds that the termination of the claimant’s service was unfair in terms of reason and procedure followed.
41. On reliefs sought, the claimant prayed for three months’ salary in lieu of notice. This is allowed since the respondent offered the same while computing claimant’s dues. The prayer for one month’s unpaid salary also succeeds and unpaid leave days since they were all considered in the final dues computation.
42. The prayer for compensation for wrongful termination succeeds and the court will award the claimant six month’s salary as compensation for unfair termination considering the fact that the respondent failed to prove the fairness of the termination and the fact that the claimant had worked for the respondent for less than a year.
43. In conclusion the Court awards the claimant as follows:
Kshs.



- i. Three month's salary in lieu of notice 405,361.50
- ii. Unpaid leave days 72,000.00
- iii. One month's unpaid salary 135,120.50
- iv. Six month's salary for unfair termination 810,723.00
Total 1,423,203
- v. Costs of the suit
- vi. The above (except v.) shall be subject to taxes and statutory deductions but shall attract interest at Court rates from date of judgment until payment in full.
- vii. The respondent shall further issue the claimant with a certificate of service.

44. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2023

DELIVERED VIRTUALLY THIS 17TH DAY OF NOVEMBER, 2023

ABUODHA NELSON JORUM

JUDGE

